Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Rebecca Baker, a Legally Incapacitated Person, by
William J. Baker, Jr., Guardian, and William J. Baker, Sr.,
Plaintiff/Appellants

vs.

Sears, Roebuck and Co.,
A Foreign Corporation,
Defendant/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals decision sanctions a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision, where the Appeal Court's affirmation of the District Court granting of Defendant/Appellee's Motion for Summary Disposition of Dismissal pursuant to FRCP 56(c), in favor of Defendant Corporation and against Plaintiff/Appellant public invitee conflicts with the prior Court of Appeal standards in reviewing the propriety of Distrct Court Summary Judgments in such negligence actions, was not a de novo review, did not view all facts nor draw all inferences in favor of Plaintiff/Appellants, made improper witness credibility determinations, and improperly weighed the evidence.

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker, Petitioners.

2. Sears, Roebuck and Co., A Foreign Corporation, Respondent.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BY OTHER COURTS 1

JURISDICTIONAL GROUNDS 2

STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

The Course of Proceedings in the Courts Below 5

Statement of Facts 4

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING A WRIT OF CERTIORARI 11

Whether the United States Court of Appeals decision sanctions a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision, where the Appeal Court's affirmation of the District Court granting of Defendant/Appellee's Motion for Summary Disposition of Dismissal pursuant to FRCP 56(c), in favor of Defendant Corporation and against Plaintiff/Appellant public invitee conflicts with the prior Court of Appeal standards in reviewing the propriety of District Court Summary Judgments in such negligence actions, was not a de novo review, did not view all facts nor draw all inferences in favor of Plaintiff/Appellants, made improper witness credibility determinations, and improperly weighed the evidence.
..... 12

CONCLUSION..... 16

APPENDIX A.Opinion of the Court of Appeals.....A-1

APPENDIX B.Opinion of the District Court (9/18/92) B-1

APPENDIX C.Opinion of the District Court (12/17/92).....C-1

TABLE OF AUTHORITIES

Cases:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 255 (1986).....10,14
Celotex Corp. v. Catrett,
477 U.S. 317, 322-23 (1986).....10,14
E.E.O.C.v. University of Detroit,
904 F. 2d 331, 334 (6th Cir. 1990).....10,13,14
Gadde v. Michigan Consolidated Gas Company,
377 Mich. 117 (1966).....14
Holloway v. General Motors,
(On Rehearing) 403 Mich. 614, 618,
271 N.W.2d 779 (1978).....10,11
Mulholland v. DEC Int'l Corp.,
432 Mich. 395, 415, 443 N.W. 2d 340,
349 (l989).....10,11
Oppenheim v. Pitcaim,
293 Mich. 475, 292 N.W. 374 (1940)..... 6
Patton v. Beardon,
8 F.3d 343, 346 6th Cir. 1993).....10,14
Skinner v. Square D Co.,
445 Mich. 153, 173, 516 N.W.2d 475 (1994) 8,9

Statutes:

2 Restatement Torts 2d, Section 343..... 3
28 USC Sec. 1291..... 3
28 USC Sec. 1332..... 2
28 USC Sec. 1441..... 2
28 U.S.C. Sec. 1254(1)..... 3

Court Rules:

Fed. R. Civ. P. 56(c)..... 10,12
14,15

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals which is the subject of this Petition was rendered on October 20, 1994 and is reported as ***Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker v. Sears, Roebuck and Company***, United States Court of Appeals Docket No. 93-1084. The Opinion and Order was not recommended for full text publication by the Court of Appeals.

On September 18, 1992, the United States District Court for the Eastern District of Michigan, Southern Division, entered a Partial Summary Judgment Memorandum Opinion and Order of Dismissal (only as to alleged presence of water on Defendant's stairway) in Petitioners' suit, ***Rebecca Baker, et. al., v. Sears, et. al.,*** Civil Action No. 91-CV-75687-DT. On December 17, 1992 , the District Court granted the balance of Defendant's Motion for Summary Judgment and entered a Final Summary Judgment of dismissal as to all remaining claims herein of the Plaintiffs.

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in the Appendix A, infra. The opinions of the United States District Court for the Eastern District of Michigan, Southern Division are reproduced in Appendix B and C, infra.

JURISDICTION

Petitioners, Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker, Sr., Plaintiff/Appellants, seek review of the decision of the United States Court of Appeals for the Sixth Circuit entered on October 20, 1994. No Petition for rehearing was filed.

This action alleging various claims of negligence, as a result of personal injuries suffered by Rebecca Baker when she slipped and fell down a staircase at Defendant's store, was brought in the Wayne County Circuit Court on or about September, 1991 and subsequently properly removed by the Defendant on or about October, 1991, to the United States District Court pursuant to 28 USC Sec. 1441. Subject matter jurisdiction in the trial court is based upon diversity of citizenship under 28 USC Sec. 1332.

On September 18, 1992 (Partial Summary Judgment Memorandum Opinion and Order of dismissal only as to alleged presence of water on Defendant's stairway)) and December 17, 1992 (Final SummaryJudgment of dismissal as to all remaining claims), the District Court granted Defendant's Motion for Summary Judgment. See Appendix B and C, respectively, infra.

On October 20, 1994, the Sixth Circuit entered a decision

affirming the District Court's order granting Summary Judgment (the Dissenting Opinion of Judge Keith is notable). See Appendix A, infra. Jurisdiction in the Court of Appeals was under Title 28, United States Code, Section 1291.

Jurisdiction of the Supreme Court to review the Court of Appeals decision of the Sixth Circuit exists under 28 U.S.C. Sec. 1254(1).

STATUTES

2 Restatement Torts 2d, Section 343, relating to the legal duty owed by a premise owner to its invitees, provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees a condition on the land, if, but only if, he (a) knows or in the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

STATEMENT OF THE CASE

This case arises from an affirmation by the Court of Appeals majority of a Summary Judgment rendered in favor of the

Defendant/Appellee, Sears, Roebuck and Company, by the District Court, which dismissed this action alleging various claims of negligence as a result of personal injuries suffered by Rebecca Baker when she slipped and fell down a staircase at Defendant's store. The Dissenting Opinion of Court of Appeals Judge Keith is notable. See Appendix A, infra.

The relevant facts are summarized in the opinion of the Court of Appeals, as follows:

> Plaintiffs Rebecca Baker ("Baker") and her husband, William J. Baker, Sr., appeal from an order of the district court granting summary judgment to defendant, Sears, Roebuck and Company, on various claims filed as a result of personal injuries suffered by Baker when she fell down a staircase at defendant's store.
>
> Within minutes of the store's opening on the morning of January 5, 1991, Baker, then forty-two years of age, and a friend, Nancy Craig, entered and travelled by escalator to the second floor in order to make a payment on Craig's account. This was accomplished quickly, and the two women decided to use the stairs to return to the first floor. The stairway consisted of two flights of stairs separated by a landing approximately midway between the floors.
>
> Craig was concerned that the stairs would be wet because it had been snowing that morning. Approaching the stairs, she noticed water on the steps and warned Baker of its presence. After advising Baker to be careful, Craig proceeded down the stairs, "one step at a time," with Baker following. The two made it down the first flight of stairs but, after beginning down the second flight, Baker fell and tumbled down the stairs past Craig, who did not see what

caused Baker to fall. She sustained a head injury and can remember nothing of the incident.

Baker filed suit against Sears in state court alleging numerous tort theories. Defendant removed the suit on diversity grounds, and moved for summary judgment. The district court concluded that Baker had pleaded three different theones of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to wam of defective and hazardous conditions.

"....the [District] court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase."

"The district court also granted summary judgment on Baker's defective design and the related failure to warn claims....".

On January 13, 1993, Plaintiff/Appellants filed a Claim of Appeal with the United States Court of Appeals, appealing the adverse December 12, 1992 District Court Final Summary Disposition Order. On October 20, 1994, the Court of Appeals issued its written ruling, affirming the District Court and from which Plaintiff/Appellants now seek relief .

THE DISTRICT COURT RULING

The District Court granted Sears' Motion for Summary Judgment, stating, as summarized in the court of appeals decision:

Defendant...moved for summary judgment. The district court concluded that Baker had pleaded three different theories of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to wam of defective and hazardous conditions. While defendant argued that the existence of water on the staircase was an open and obvious danger, the district court found it unnecessary to address this issue due to Baker's failure to produce any evidence that defendant had notice of the existence of water on the stairs. See *Oppenheim v. Pitcairn*, 293 Mich. 475, 292 N.W. 374 (1940) (charge of negligent failure to maintain premises in reasonably safe condition requires proof that unsafe condition was known to the one on whom the duty rested, or that the character of the danger such that reasonably prudent incumbent should have knowledge).

In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond.....Therefore, the court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district court also granted summary judgment on Baker's defective design and the related failure to warn claims....Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and

> then pointed to the possibility that the defect caused her fall.* Baker's counsel also attempted to avoid summary judgment by asserting that Baker's sister "will testify that [Baker] told her...that she slipped while stepping on a dry area of the step." The court...rejected this proffer of testimony....". Other than this proffer, Baker...provided no evidence to show that the alleged defect caused the fall.[3]

THE RULING OF THE COURT OF APPEALS

In reviewing the District Court decision, the Sixth Circuit majority Opinion stated:

> In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond. Indeed, the only summary judgment evidence going to notice was provided by defendant, and it supported the contention that there was no such notice.[1] Therefore, the court granted

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* Appellants' Appeal Court Brief states at page 6: "In deposition, Plaintiffs' safety expert, Walter Cygan, opined that the slope of the subject stairway did not conform to the suggested slope of 30-35 degrees and constituted an unsafe condition....Mr. Cygan also performed a friction test and concluded that the stairway surface was unreasonably slippery even when dry....".

[1] Defendant presented the deposition testimony of one of its employees that he had used the stairs ten or fifteen minutes before the accident, and inspected them about two minutes before the accident, and that at neither time did he see water on the stairs.

[3] Baker also attempted to rely on a presumption found in Michigan law, as stated in a Michigan jury instruction which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent....".

summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district court also granted summary judgment on Baker's defective design and the related failure to warn claims. As defendant noted, Baker's position seemed to shift here to a theory that if she did not slip on a wet step, then she must have slipped on a defectively designed dry one. Defendant maintained that Baker had failed to offer any evidence concerning how she fell and was, therefore, unable to prove that the design ofthe staircase was the proximate cause of her injuries.[2] Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and then pointed to the possibility that the defect caused her fall.

Baker's reliance upon the expert's testimony is misplaced for several reasons. First, "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury . . . [because] 'there must be facts in evidence to support the opinion testimony of an expert.' " *Skinner v. Square D Co.*, 445 Mich. 153, 173, 516 N.W.2d 475 (1994) (citations omitted)..

Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely

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[2] Defendant conceded, for the purposes of this argument, the issues of duty, breach, and damages.

stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof must facilitate reasonable inferences of causation' not mere speculation." *Id.* at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

Baker's counsel also attempted to avoid summary judgment by asserting that Baker's sister "will testify that [Baker] told her . . . that she slipped while stepping on a dry area of the step." The court properly rejected this proffer of testimony as insufficient to defeat a properly supported motion for summary judgment because it "failed to go beyond the pleadings and was mere inadmissible hearsay. Other than this proffer, Baker has provided no evidence to show that the alleged defect caused the fall.[3] Accordingly, because causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment," *Id.* at 172-73, the district court properly granted summary judgment.

The district court's orders granting summary judgment to defendant on all claims are affirmed.

In reviewing the District Court decision, the Sixth Circuit dissenting Opinion stated:

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[3] Baker also attempted to rely on a presumption found in Michigan law, as stated in a Michigan jury instruction which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent....".

Damon J. Kelth, Circuit Judge, dissenting. I disagree with the majority's determination that summary judgment was properly granted on Baker's claims of defective design and failure to warn. Therefore, I respectfully dissent from tlhe Court's opinion, and write separately.

Our review of a district court's grant of summary judgment is de novo. *Patton v. Beardon*, 8 F.3d 343, 346 6th Cir. 1993). All facts must be viewed and inferences drawn in favor of the plaintiffs. *E.E.O.C.v. University of Detroit*, 904 F. 2d 331, 334 (6th Cir. 1990). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgmcnt as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The judge may not make credibility determinations or weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

First, the majority and the court below improperly diverged from the summary judgment standard by failing to draw inferences in Baker's favor and discounting the weight of expert testimony. Plaintiffs may use circumstantial proof to show the requisite causal link beween a defect and an injury in Michigan products liability cases. *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 415, 443 N.W. 2d 340, 349 (l989); *Holloway v. General Motors*, (On Rehearing) 403 Mich. 614, 618, 271 N.W.2d 779 (1978). Contrary to the majority's characterization, testimony by Craig and his expert that Baker slippcd on Sears's wet and unreasonably steep stairs is not hypothetical, but circumstantially cstablishes causation between Sears' negligence and Baker's injury sufficient to require a trial.

Second, while Baker's injuries were possibly caused by something other than Sears' negligence, this is a question of fact for the jury, not a determination for the majority or the court below on summary judgment. Baker need not positively exclude every possible cause, but must simply establish a logical sequence of cause and effect.

Mulholland, 432 Mich. at 415, 443 N.W. 2d at 349. Through the testimony of Craig and the expert witness, Baker has established a logical sequence that Sears' negligence caused her injuries. Further questions of comparative probability should be determined by the trier of fact. *Holloway*, 403 Mich. at 622, 271 N.W.2d at 781.

There exists a genuine issue of material fact as to whether Sears' negligence caused Baker's injuries. The plaintiff has introduced evidence that Baker slipped on wet, defectively designed stairs. Examining the facts, and drawing all inferences in favor of Baker, I am unable to state that Sears is entitled to judgment as a matter of law. By weighing comparative probability and dismissing Baker's claim, the majority improperly userps the power of the jury and unfairly deprives Baker of access to our judicial system.

Accordingly, I would reverse the summary judgment determination of the district court and grant Plaintiffs a trial.

REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the radical departure of the District Court and court of appeals in this particular negligence matter, in applying and sanctioning, respectively, summary judgment and/or review standards to the parties in this particular case, which standards are "not the norm". Absent a reversal by this Honorable Court, the case sets a dangerous summary disposition and/or review standard which conflicts with respected and logical law and practice at the original situs:

WHETHER THE UNITED STATES COURT OF APPEALS DECISION SANCTIONS A DEPARTURE BY THE LOWER (DISTRICT COURT) FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE UNITED STATES SUPREME COURT'S POWER OF SUPERVISION, WHERE THE APPEAL COURT'S AFFIRMATION OF THE DISTRICT COURT'S GRANTING OF SUMMARY DISPOSITION OF DISMISSAL PURSUANT TO FRCP 56((c) IN FAVOR OF DEFENDANT CORPORATION AND AGAINST PLAINTIFF CUSTOMER AND HER PLAINTIFF FAMILY CONFLICTS WITH THE PRIOR STANDARD SET BY THE COURT OF APPEALS AS TO THE PROPRIETY OF SUMMARY JUDGMENTS IN NEGLIGENCE ACTIONS, WAS NOT A DE NOVO REVIEW, DID NOT VIEW ALL FACTS NOR DRAW ALL INFERENCES IN FAVOR OF PLAINTIFFS, MADE CREDIBILITY DETERMINATIONS AND WEIGHED THE EVIDENCE?

FRCP 56(c) was (is) the basis for corporate Defendant Sears' Motion for summary disposition of dismissal. It clearly requires, for dismissal of the case, " pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, comma, and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there a genuine issue as to the amount of damages."

The undisputed evidence shows that (arguendo) even if the stairway were dry, and not wet (Appellants do not concede that the stairs were dry), the steep pitch and construction materials of the stairway may well have have been the proximate cause of the Plaintiff's fall. While it is possible to infer that it may not have been the proximate cause, it is also possible to infer that it may have been. In such as case, the substantive law of the situs mandates that "all facts must be viewed and inferences drawn in favor of the plaintiffs" for purposes of summary disposition. *E.E.O.C. v. University of Detroit*, 904 F. 2d 331, 334 (6th Circuit 1990).

Appellants' Appeal Court Brief states at page 6: "In deposition, Plaintiffs' safety expert, Walter Cygan, opined that the slope of the subject stairway did not conform to the suggested slope of 30-35 degrees and consituted an unsafe condition....Mr. Cygan also performed a friction test and concluded that the stairway surface was unreasonably slippery even when dry....".

However, in disposing of the Plaintiffs' record deposition proof as to the defective design of the stairway, and contrary to its own rule therefor, (*E.E.O.C.*, supra), the appeal court subjectively stated:

> Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof must facilitate reasonable inferences of causation' not mere speculation." Id. at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

In so doing, and contrary to Anderson, supra, the appeal court determined the credibility of the expert witness and also weighed his testimony as against the possibility that Plaintiff did not fall due to the defective design or that the stairs were not defectively designed. But that function of assigning credibilty and weight of the record evidence is for the jury and is not the function of the trial judge and it is certainly not a matter of law, or the basis of FRCP 56(c).

In addition to the *Patton, E.E.O.C., Celotex, and Anderson* cases cited, supra, *Gadde v. Michigan Consolidated Gas Company*, 377 Mich. 117 (1966) also supports Plaintiff/Appellants, reflecting the majority views of the law.

As a matter of public policy, every municipality would like to have a local Sears store, and certainly as a practical matter, we

don't want to "sue them away". As a matter of law and public policy, however, individuals and the public entering their stores ought to be safe from faulty design defects such as steep and unsafe steps. A person should not have to be a top athlete to negotiate those stairs. If the lower courts want to assign weight and credibility factors, what about the Sears employee who (while still under Sears' employ) just "didn't see any snow". Is that testimony more reliable than the expert witness? Is it the function of the District Court Judge or the Court of Appeals on a de novo review to assign those factors on a 56(c) motion?

A better candidate for reversal and remand than this case cannot be found. Mrs. Baker was so severely disabled that it is a sobering experience just to watch her attempt to get up and move around. She has this, from Sears - permanently. No higher Court may want to reverse a lower court unless there is sound law and strong public policy, and a need to eradicate a dangerous precedent. Those factors exist here. Sears' has been and will do well regardless of the outcome, but in the long run must consider the public safety as a condition precedent to opening a store in a community.

Judge Keith stated it truthfully and well.

CONCLUSION

For the foregoing reasons, Petitioner Appellants respectfully pray that a Writ of Certiorari issue to review the decision of the majority of the 6th Circuit in this case.

Respectfully Submitted,

January 12, 1994

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No. 93-1084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA BAKER, a legally incapacitated person, by WILLIAM J. BAKER, Jr., Guardian, and WILLIAM J. BAKER, SR. Plaintiffs-Appellants v. SEARS, ROEBUCK AND COMPANY, Defendant-Appellee.	NOTRECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule permits citation to specific situations. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court. This notice is to be prominantly displayed if this decision is reproduced.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: KEITH, NORRIS and BATCHELDER
Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiffs Rebecca Baker ("Baker") and her husband, William J. Baker, Sr., appeal from an order of the district court granting summary judgment to defendant, Sears, Roebuck and Company, on various claims filed as a result of personal injuries suffered by Baker when she fell down a staircase at defendant's store. We affirm.

Within minutes of the store's opening on the morning of January 5, 1991, Baker, then forty-two years of age, and a friend, Nancy Craig, entered and travelled by escalator to the second floor in order to make a payment on Craig's account. That was accomplished quickly, and the two women decided to use the stairs to return to the first floor. The stairway consisted of two flights of stairs separated by a landing approximately midway between the floors.

Craig was concerned that the stairs would be wet because it had been snowing that morning. Approaching

the stairs, she noticed water on the steps and warned Baker of its presence. After advising Baker to be careful, Craig proceeded down the stairs, "one step at a time", with Baker following. The two made it down the first flight of stairs but, after beginning down the second flight, Baker fell and tumbled down the stairs past Craig, who did not see what caused Baker to fall. She sustained a head injury and can remember nothing of the incident.

Baker filed suit against Sears in state court, alleging numerous tort theories. Defendant removed the suit on diversity grounds, and moved for summary judgment. The district court concluded that Baker had pleaded three different theories of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to warn of defective and hazardous conditions. While defendant argued that the existence of water on the staircase was an open and obvious danger, the district court found in unnecessary to address this issue due to Baker's

failure to produce any evidence that defendant had notice of the existence of water on the stairs. See Oppenheim v. Pitcairn, 293 Mich. 475, 477, 292 A-4 N.W. 374 (1940) (charge of negligent failure to maintain premises in reasonably safe condition requires proof that unsafe condition was known to the one on whom the duty rested, or that the character of the danger such [SIC] that reasonably prudent incumbent should have knowledge).

In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond. Indeed, the only summary judgment evidence going to notice was provided by defendant, and it supported the contention that there was no such notice.[1] Therefore, the court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district also granted summary judgment on Baker's

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[1] Defendant presented the deposition testimony of one of its employees that he had used the stairs ten or fifteen minutes before the accident, and inspected them about two minutes before the accident, and that at neither time did he see water on the stairs.

defective design and the related failure to warn claims. As Defendant noted, Baker's position seemed to shift here to a theory that if she did not slip on a wet step, then she must have slipped on a defectively designed dry one. Defendant maintained that Baker had failed to offer any evidence concerning how she fell and was, therefore, unable to prove that the design of the staircase was the proximate cause of her injuries.[2] Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and pointed to the possibility that the defect caused her fall.

Baker's reliance on the expert's testimony is misplaced for several reasons. First, "expert opinion based only upon

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[2] Defendant conceded, for the purposes of this argument, the issues of duty, breach, and damages.

hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury...[because] 'there must be facts in evidence to support the opinion testimony of an expert.'" Skinner v. Square D Co., 445 Mich. 153, 173, 516 N.W. 2d 475 (1994) (citations omitted.)

Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof "must facilitate reasonable inferences of causation, not mere speculation." Id. at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

Baker's counsel also attempted to avoid summary

judgment by asserting that Baker's sister "will testify that [Baker] told her...that she slipped while stepping on a dry area of step." The court properly this proffer of testimony as insufficient to defeat a properly supported motion for summary judgment because it "failed to go beyond the pleadings," and was inadmissible hearsay. Other than this proffer, Baker has provided no evidence to show that the alleged defect caused the fall.[3] Accordingly, because "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment.

The district court's orders granting summary judgment to defendant on all claims are affirmed.

Damon J. Keith, Circuit Judge, dissenting. I disagree with the majority's determination that summary judgment was

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[3] Baker also attempted to rely upon a presumption found in Michigan Law, as stated in a Michigan jury instruction, which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent. Mich. SJI 2d 10.09. However, the district court properly rejected this argument as insufficient to defeat defendant's motion. A presumption that Baker was not negligent does not tend to prove that the alleged defect was more likely than not the cause of the fall, since other causal possibilities remain.

properly granted on Baker's claims of defective design and failure to warn. Therefore, I respectfully dissent from the Court's opinion, and write separately.

Our review of a district court's grant of summary judgment is de novo. Patton v. Bearden, 8 F.3d 343. 346 (6th Cir. 1993). All facts must be viewed and inferences drawn in favor of the plaintiffs. E.E.O.C. v. University of Detroit, 904 F.2d 331,334 (6th Cir. 1990). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catret, 477 U.S. 317, 322-23 (1986). The judge may not make credibility determinations or weigh the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

First, the majority and the Court below improperly diverged from the summary judgment standard by failing to draw inferences in Baker's favor and discounting the weight of expert testimony. Plaintiffs may use circumstantial proof to show the requisite causal like between a defect and an injury

in Michigan product liability cases. Mulholland v. DED Int'l Corp., 432 Mich. 395, 415, 443 N.W. 2d 340, 349 (1989); Holloway v. General Motors, (on rehearing), 403 Mich. 614, 618, 271 N.W. 2d 777, 779 (1978). Contrary to the majority's characterization, testimony by Craig and his expert that Baker slipped on Sears' wet and unreasonably steep stairs is not hypothetical, but circumstantially establishes causation between Sears' negligence and Baker's injury sufficient to require a trial.

Second, while Baker's injuries were possibly caused by something other than Sears' negligence, this is a question of fact for the jury, not a determination for the majority or the court below on summary judgment. Baker need not positively exclude every possible cause, but must simply establish a logical sequence of cause and effect. Mulholland, 432 Mich. at 415, 443 N.W. 2d at 349. Through the testimony of Craig and the expert witness, Baker has established a logical sequence that Sears' negligence caused her injuries. Further questions of comparative probability should be determined

by the trier of fact. Holloway, 403 Mich. at 622, 443 N.W. 2d at 781.

There exists a genuine issue of material fact as to whether Sears' negligence caused Baker's injuries. The Plaintiff has introduced evidence that Baker slipped on wet, defectively designed stairs. Examining the facts, and drawing all inferences in favor of Baker, I am unable to state that Sears is entitled to judgment as a matter of law. By weighing comparative probability and dismissing Baker's claims, the majority improperly usurps the power of the jury and unfairly deprives Baker of access to our judicial system.

Accordingly, I would reverse the summary judgment of the district court, and grant Plaintiffs trial.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, a legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.
_____/

MEMORANDUM OPINION AND ORDER

At A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 18th day of September 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This matter is before the Court on Defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). Plaintiff's response was untimely, however, in the interest of

justice, this Court accepted the response.[1] Defendant filed a reply brief. Pursuant to E.D. Mich. Local R. 7.1(e)(2), this Court orders that this motion be disposed of upon the briefs submitted by the parties without this Court entertaining oral arguments. For the reasons that follow, defendant's motion of summary judgment is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

Plaintiff, Rebecca Baker, through her representatives, brought suit against defendant, Sears, Roebuck and Co., for injuries plaintiff sustained when she slipped and fell while descending a flight of stairs at defendant's Highland Park store. Plaintiff contends that as a result of her fall she has suffered a close-head injury and that she has no memory with respect to the circumstances surrounding the incident

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[1] Plaintiff also filed a document entitled "Plaintiff's response to defendant's reply to plaintiff's answer to defendant's motion for summary judgment." Plaintiff did not seek leave from this Court before filing this unauthorized document. for the purposes of this Memorandum Opinion and Order, this Court will not consider this document.

inissue.[2] Plaintiff's friend, Ms. Nancy Craig, was accompanying plaintiff at the time of the accident and is the only witness to the event.[3]

The facts in this case are not in dispute. On the morning of January 5, 1991, Ms. Craig went to have her car serviced at defendant's Highland Park store. Plaintiff offered to give Ms. Craig a ride home if Ms. Craig had to leave her car at defendant's store to be serviced. Ms. Craig arrived at the car care center of defendant's store at approximately

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[2] In her deposition, plaintiff testified as follows:
Q: Do you [plaintiff] recall falling does at Sears?
A: I can't remember.
Q: Do you recall having an accident in which you injured yourself or hurt yourself?
A: I can't remember that.
Q: Do you remember falling on any stairs?
A: I can't remember.
Q: Do you recall being at a Sears Store with your friend, Nancy Craig?
A: I can't remember.
Q: Can you recall the last time you were at a Sears store?
A: No.

Plaintiff deposition at 28.

[3] It should be noted that Ms. Craig was walking in front of plaintiff, and thus Ms. Craig was unable to see how plaintiff fell. Ms. Craig only saw plaintiff after she had fallen.

7:30 a.m.[4] Plaintiff arrived at approximately 7:50 a.m. to provide Ms. Craig transportation home.

However, Ms. Craig decided to wait at defendant's store while her car was being serviced. Plaintiff decided to wait along with her friend. While to two were waiting for Ms. Craig's car to be serviced, Ms. Craig decided to go to the second floor of the department store in order to pay her credit card bill. Soon after the department store opened for business Ms. Craig and plaintiff proceeded to the credit department located on the second floor of the department store. After paying the bill, plaintiff and Ms. Craig decided to use the stairs instead of the escalator in order to make their way back down to the car care center.

The stairway consisted of two flights of stairs divided by a landing. Plaintiff fell on the second flight of stairs, due in part to the existence of water on the stairs. Plaintiff also contends that the stairway was maintained or designed in a

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[4] The building that contains defendant's car care center is a separate building for defendant's department store building. The car care center opens for business at 7:00 a.m., while the department store opens for business at 9:30 a.m.

defective condition. Plaintiff's complaint lists the following ways in which the staircase was defective.

> a. [Defendant] Failed to properly maintain its premises in that it allowed a dangerous condition to exist in the form of a defective staircase upon which business invitees were required to walk;
>
> b. [Defendant] Carelessly and negligently permitt[ed] said staircase to remain in a slippery, dangerous and defective condition and not exercising reasonable care to correct said condition;
>
> c. Failure to take reasonable precautions to remove the slippery substance from said staircase so as to make the staircase suitable for walking thereon;
>
> d. Failed to take reasonable precautions to make the above mentioned staircase safe and suitable for walking thereon;
>
> e. Knew or should have known that the above mentioned staircase was in a defective and unsafe condition;
>
> f. That if defendant made any attempt to maintain the staircase, defendants actions were performed in such a manner so as to increase the hazard to the plaintiff herein;
>
> g. Failed to warn the plaintiff of a defective and hazardous condition of the above mentioned staircase which the defendant knew or should have known existed at the aforementioned time;
>
> h. Failure to place a covering/runner on the individual stairs in the above mentioned staircase.

A close reading of this Complaint reveals that plaintiff is proceeding on various theories of negligence. These theories include: defective design of the staircase; allowing water to remain on the steps; and failure to warn of defective condition.

As plaintiff and Ms. Craig approached the stairs, Ms. Craig testified that she was concerned that there might be water on the stairs, because earlier that morning it had started to snow. Ms. Craig also testified, in her deposition, as follows:

> Q: [C]ould you see that the stairs were wet or did you have to step on the stairs in order to know that it was wet?
> A: You have to step on it in order to see.
> * * *
> Q: Did you say to Rebecca [plaintiff]: Let's be careful on these steps, they might be slippery?
> A: That's what I said to Rebecca.
> Q: Before you started walking down the steps?
> A: Yes.
> Q: Is this before you actually got to the steps and saw water?
> A: While we were walking down. Coming down.
> Q: On the top flight of steps?
> A: Top and bottom, as you walk.
> Q: At what point did you say to her - I guess what you're saying, when you first started walking down the upper flight, that's when you said to her, these steps are wet,

they might be slippery?
A: When you walking down, you're walking down like you're going to fall on your face. That's the way the flights are made.

Ms. Craig's deposition at 15 and 64. As stated above, while plaintiff was proceeding down the second flight of stairs, she fell and sustained injuries.

II. STANDARD OF REVIEW

Defendant brought this motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). Under this rule, summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the nonmoving

party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). Where the non-moving party has failed, however, to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant and thus summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986).

III. Opinion

Defendant is an owner of a premises which is held out to the public as a place of business. Under Michigan tort law plaintiff is a business invitee, that is, she "is one who enters a premises to conduct business that concerns the premises owner at the owner's express or implied invitation." Riddle v. McClouth Steel Products Corp., 440 Mich. 85, 90-91, 485 N.W.2d 676 (1992) (citations omitted). The issue of the duty of care a defendant owes a plaintiff is a threshold issue which the trial court must decide as a matter of law. Riddle, at 95

(citing Antcliff v. State Employees Credit Union, 414 Mich. 624; 327 N.W.2d 814 (1984). The Michigan Supreme Court, in Quinlivan v. Great Atlantic & Pacific Tea Co.,Inc., 395 Mich. 244, 235 N.W. 2d 732 (1975), cited with approval the following test which defines a premises owner's duty of care to invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition of the land, if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

395 Mich. at 256-60 (quoting 2 Restatement Torts, 2d, § 343).

In Williams v. Cunningham Drug Stores, Inc., 429 Mich. 495, 418 N.W.2d 381 (1988), the Michigan Supreme Court discussed the affect of the invitee's knowledge of a dangerous condition on the premises owner's duty of care owed to the invitee. The Court stated that:

> A possessor of land is not liable to his invitees for physical harm caused to them by

> any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

429 Mich at 500.

Finally, in Riddle, supra, the Michigan Supreme Court held "that the 'no duty to warn of open and obvious dangers' rule remains viable in Michigan" despite the fact that Michigan has adopted the doctrine of comparative negligence. 440 Mich. at 99-100. The Riddle Court summarized the status of the law as follows:

> [T]he 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prime facie negligence case...If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.

Id. at 95-96 (footnotes omitted).

Accordingly, under Michigan law, plaintiff must produce evidence to show the following elements in order to

establish a prima facia cause of action against defendant: (1) an unsafe condition existed on defendant's premises; (2) that the unsafe condition was either caused by one of defendant's employees or, if not caused by defendant, was known or should have been known by defendant; and (3) defendant failed to take reasonable steps to rectify the unsafe condition. Quinlivan, 395 Mich. at 259; Serinto v. Borman Food Stores, 380 Mich 637, 640-41, 158 N.W.2d 485 (1986); Whitmore v. Sears, Roebuck & Company, 89 Mich. App. 3, 8-9; 279 N.W.2d 318 (1979). Defendant still may raise the affirmative defense of an "open and obvious danger." Riddle, 440 Mich. at 95-96.

A. WATER ON THE STAIRS AS AN UNSAFE CONDITION

Defendant contends that the existence of the water on the staircase was an open and obvious danger, and under Riddle, defendant did not owe a duty to protect its invitees. However, this Court needs not address this issue because plaintiff has failed to set forth evidence that goes to whether defendant had notice of the existence of the water

on the staircase.

As stated above, plaintiff must produce evidence that the unsafe condition, namely, water on the stairs, was either cause by an employee of defendant or, if not caused by defendant, was known or should have been known by defendant. See e.g. Whitmore, 89 Mich. App. at 8-9. Defendant asserts that plaintiff has no evidence to establish this element, and thus, as a matter of law, plaintiff's claim -- that the existence of water on the staircase made the staircase unreasonably dangerous -- must fail. Defendant's argument is persuasive.

The Michigan Supreme Court, in Oppenheim v. Pitcairn, 293 Mich. 475, 292 N.W. 374 (1940), held that a plaintiff cannot meet the burden of proof on this element where a plaintiff cannot establish how long the condition existed. 293 Mich. at 478. In that case, plaintiff fell on a smooth terrazzo floor which was located in defendant's train station. On the day in question, it was raining outside and plaintiff testified that the floor was wet and slushy where she

fell. The Michigan Supreme Court held that this was insufficient to meet plaintiff's burden of proof. Id. See also Whitmore, 89 Mich. App. at 8-10 (plaintiff';s testimony that numerous cars appeared to have driven through oily substance located on defendant's parking lot was insufficient because it was mere conjecture).

In the instant case, Ms. Craig does not know how long the water had been on the stairs and assumes that it was tracked in from the outside. Further, defendant's store had just opened for business. Moreover, an employee of defendant testified in a deposition that he inspected the stairs in question anywhere from 2 to 5 minutes before the accident occurred and observed no water on the stairs. In addition, this same employee testified that he had used these stairs approximately 15 minutes before the accident and that no water was present on the stairs.

Plaintiff did not address this issue in her response brief. The following passage from Celotex is dispositive on whether summary judgment is appropriate on this issue.

> The burden on the moving party may be discharged by "showing" -- this is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case. Once a moving party has made that showing, the burden passes to the non-moving party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.

Celotex, 477 U.S. 317, 106 S.Ct. 2548, 2554. Plaintiff failed to even address this issue. Therefore, there is no genuine issue of material fact as to plaintiff's inability to produce evidence to show how long the water was on the stairs and who was responsible for the water being there. Thus, plaintiff fails to make out a prima facie case under Michigan law. Accordingly, defendant's motion for summary judgment with respect to the issue of whether defendant was negligent in allowing the water to be on the stairs is GRANTED.[5]

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[5] The extent that plaintiff's claim that defendant failed to warn plaintiff of a dangerous condition is implicated by water being the dangerous condition, it follows that plaintiff's failure to warn claim no longer exists, because the existence of the water, as a matter of law, was not a dangerous condition which defendant could be held liable for. Therefore, defendant, as a matter of law, did not have to provide any warnings with respect to the water which existed on the staircase.

B. DEFECTIVE DESIGN AND DUTY TO WARN

As to plaintiff's claim that the stairs were negligently designed or maintained, defendant argues that such a claim is based entirely on impermissible speculation and conjecture. Defendant attacks the prong of the test that requires plaintiff to establish that an unsafe condition existed on defendant's premises. The crux of defendant's argument is that plaintiff's expert witness does not say and does not qualify to opine that plaintiff's fall was due to anything else besides the water being on the stairs.

The issue of whether plaintiff's expert is qualified to be an expert witness under the Federal Rules of Evidence is not before the Court at this time. Viewing the facts in the light most favorable to plaintiff, the non-moving party, as this Court is required to do, it will be assumed for the purposes of this motion that plaintiff's expert will qualify as an expert witness under the Federal Rules of Evidence. Plaintiff's expert, in his deposition, has offered sufficient evidence that goes to how the staircase in issue was negligently designed. Since a

reasonable jury could find for plaintiff on the issue of negligent design, summary judgment on this issue is inappropriate. See Anderson, 106 S.Ct. at 2511. Therefore, defendant's motion for summary judgment as it relates to the design of the staircase in issue is DENIED.

III. CONCLUSION

This Court, after a careful review of the briefs, the depositions, and the case file, hereby ORDERS that defendant's motion for summary judgment be GRANTED as to the issue of defendant's liability based on the existence of water on the staircase. However, it is further ORDERED that defendant's motion for summary judgment be DENIED as to the issue of negligent design of the staircase.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally Incapacitated Person, by WILLIAM J. BAKER, Jr., Guardian, and WILLIAM J. BAKER, SR.

Plaintiffs,

v.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.
_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 17th day of December 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This matter is before the Court on defendant's motion

for summary judgment pursuant to Fed. R. Civ. P. 56(c).[1] Both plaintiff and defendant have filed their respective supplemental briefs on the issue of plaintiff's negligent design claim, and both parties filed an additional response brief.[2] Pursuant to E.D. Mich. LR 7.1(e)(2), the Court ORDERS that defendant's motion for summary judgment be disposed of upon the briefs which the parties have filed and without the Court entertaining oral arguments on this motion. For the reasons set forth below, defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

In its 18 September 1992 Memorandum Opinion and Order, the Court set forth the facts of this case in great detail. September 18, 1992, Memorandum Opinion and Order at 2-

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[1] In a Memorandum Opinion and Order dated September 18, 1992, the Court granted defendant's motion for summary judgment as to the issue of its liability for water being on the stairs. In an Order dated 15 October 1992, the Court directed the parties to submit supplemental briefs addressing the issue of summary judgment on plaintiff's design defect claim.

[2] Although the Court did not order the parties to file these response briefs, the Court will consider them in its determination of this motion.

5. The Court finds no reason to repeat the facts in this Opinion.

II. OPINION

A. STANDARD OF REVIEW

Defendant brought this motion for summary judgment pursuant to Fed. R. Civ. P. 56. Under this rule, summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the non-moving party." Id. 106 S.Ct. at 2510. However, as the Supreme Court stated in Celotex

Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986):

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on as essential element of her case with respect to which she has the burden of proof.

Id. 106 S.Ct. at 2252. In addition, "Rule 56(e)...requires the non-moving party to go beyond the pleadings and by her own affidavit, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. 106 S.Ct. at 2553.

The Court notes, however, that this case is one based in negligence and that:

> The purpose of the [summary judgment] rule is

> not to cut litigants off from the right to trial by jury....[A] party should not be deprived of an adequate opportunity to fully develop his case by witnesses in an trial where the issues involved make such procedure the appropriate one.... In the instant case, plaintiff seeks recovery based upon defendant's alleged negligence. This Court has previously noted that there is eminent authority in support of the proposition that issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner... It is only in the exceptional negligence case that the rule should be invoked.... And even where the trial judge reasonably may surmise that plaintiff is unlikely to prevail upon a trial, that is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them.

Rogers v. Peabody Coal Co., 342 F.2d 749, 750, 751 (6th Cir. 1965) (citations omitted).

However, "it would be wrong to assume that summary judgment is never appropriate in negligence actions. A summary judgment motion in favor of defendant should be granted in those cases in which there is no genuine issue as to any fact that is crucial to plaintiff's cause of action so that as a matter of law he cannot recover." C. Wright, A. Miller, &

M. Kane, Federal Practice and Procedure: Civil 2d § 2729, at 197 (1983).

B. PLAINTIFF'S NEGLIGENT DESIGN CLAIM

Plaintiff claims that the stairs at defendant's store, on which she fell, were negligently designed. Under Michigan law, plaintiff bears the burden of proving her prima facia case of negligence at trial. See, e.g., Yearsley v. Citibank, 361 Mich. 574, 577, 106 N.W.2d 162 (1960). It is axiomatic that in order to prove that defendant was negligent plaintiff must prove the following: 1) that defendant owed a duty to plaintiff; 2) that defendant breached that duty; 3) that the breach of that duty was both the actual and the proximate cause of plaintiff's injury; and 4) plaintiff must have suffered damages. See, e.g., Schindler v. United States, 661 F.2d 552 (6th Cir. 1981).

Defendant's first argument in support of its motion for summary judgment center's around plaintiff's ability to prove that the stairs in issue were the proximate cause of plaintiff's injuries. Defendant as conceded, for the limited purpose of

this motion, that plaintiff can prove that defendant owed plaintiff a duty, that defendant breached that duty by having a negligently designed staircase at its place of business, and that plaintiff has suffered damages.

Defendant relies on the many representations made by plaintiff's counsel in briefs filed with the Court, in which plaintiff concedes that '[t]here is no way to verify what Plaintiff saw or actually slipped on as she was carefully walking down the steps." Plaintiffs' supplemental brief at 4. However, in the same supplemental brief, plaintiff states that:

> Prior to Plaintiff's memory loss, she told other family members that she actually avoided the water on the steps and slipped on a dry part of the step. Corrine Rogers, Plaintiff's sister, will testify that Ms. Baker [plaintiff] told her shortly after the incident that she avoided the water on the steps and that she slipped while stepping on a dry area of the step. Furthermore, Ms. Rogers stated that she did not slip on anything else (i.e., show lace, pant leg, etc.), besides the slippery dry step.

Plaintiffs' supplemental brief at 5.

This assertion, by plaintiff's counsel, as to what Ms. Rogers will testify to is insufficient to rebut a properly supported

motion for summary judgment. The description of what Ms. Rogers will testify to at trial was contained in an unsworn assertion by plaintiff's counsel. Ms. Rogers has not been disposed in this case. Ms. Rogers did not file an affidavit in this case regarding her testimony. Accordingly, plaintiff has failed to go beyond the pleadings and as not presented an affidavit or parts of a deposition, an answer to interrogatories, or an admission on file, which designates a specific fact showing the there is a genuine issue of material fact regarding an essential element of her claim which she bears the burden of proof on at trial, that is, the element of causation. See Fed. R. Civ. P. 56(e); Celotex, supra. Accordingly, plaintiff's counsel's assertion as to what Ms. Rogers will testify to at trial is insufficient to rebut a properly support motion for summary judgment.[3]

---

[3] In addition, for the sake of completeness, the Court notes that even if the assertion had been contained in an affidavit, that the statement would not be admissible evidence at trial because the testimony is hearsay. Fed. R. Civ. P. 56(e) requires that statements in affidavits be in the form of admissible evidence. Plaintiff argues that it would be admissible under Fed. R. Evid. 804(b)(5), which provides, in relevant part:

> (b) Hearsay exceptions. --The following are not excluded by the hearsay rule if the declarant is

Plaintiff also relies on the Michigan Standard Jury Instructions in an attempt to defeat defendant's motion for summary judgment. The relevant jury instruction provides as follows: "Since Plaintiff has a loss of memory concerning the facts of this case and it was caused by the occurrence, you may infer that the Plaintiff was not negligent." Mich. SJI2d 10.09. Plaintiff's reliance on this jury instruction is misplaced. Jury instruction 10.09 was adopted in light of the Michigan Supreme Court's decision in Knickerbocker v. Samson, 364

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unavailable as a witness:

....

(5) Other exception. --A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best by served by admission of the statement into evidence.

Plaintiff neglects to point to the circumstantial guarantees of trustworthiness in the statement and none are immediately apparent to the Court. The statement was not made during a deposition or in an adversarial setting. In addition, the statement was not sworn to. Based on this, the Court finds that the statement does not have equivalent circumstantial guarantees of trustworthiness, and thus the statement would not be admissible under Fed. R. Evid. 804(b)(5).

Mich. 439, 111 N.W.2d 113 (1961). In Knickerbocker, the court held that where the defendant has the burden of proving the plaintiff's negligence -- in light of the fact the Michigan has adopted the comparative negligence standard -- that there would be no presumption of negligence where plaintiff had no recollection of the incident. As defendant states in its brief to the Court: "Plaintiff here attempts to turn that principle inside out and use it affirmatively, arguing that where plaintiff has the burden to prove negligence by defendant and plaintiff has no recollection of the incident, there some is a presumption that the defendant was negligent." Defendant's supplemental brief at 12n.2. Such argument is not supported by the law in Michigan.

Furthermore, a proper reading of the jury instruction shows the weakness of plaintiff's argument. In relevant part the jury instruction provides that "Plaintiff has a loss of memory...and it was caused by the occurrence [defendant's negligence]...." Here, there is no evidence that defendant's allegedly defective staircase was the cause of plaintiff's fall.

Moreover, the jury instruction states that the jury "may infer that the plaintiff was not negligent." In order for the jury instruction to have the effect which plaintiff seeks to have this Court give it, the jury instruction would have to provide that the jury "may infer that the defendant was negligent." Accordingly, Mich. SJI2d 10.09 does not help plaintiff to rebut defendant's properly supported motion for summary judgment.

Consequently, the Court finds that plaintiff has failed to make a showing sufficient to establish the existence of an element essential to plaintiff's case and on which plaintiff has the burden of proof at trial, and thus summary judgment in favor of defendant is proper. See Fed. R. Civ. P. 56(c); Celotex, supra. Because the Court grants defendant's motion for summary judgment for the reasons stated immediately above, the Court does not reach the issue of whether plaintiff's expert witness qualifies under the Federal Rule of Evidence.

CONCLUSION.

For all of the aforementioned reasons, defendant's motion for summary judgement as to plaintiff's negligent design claim is hereby GRANTED.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-1413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REBECCA BAKER, A Legally Incapacitated Person,
By WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.

Petitioners,

v.

SEARS, ROEBUCK AND CO.,
A Foreign Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES C. DEWITT, JR. (P26636)
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WILLIAM J. VINCENT (P38430)
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March 22, 1995

BEST AVAILABLE COPY

QUESTIONS PRESENTED

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S GRANT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHERE THE COURT OF APPEALS APPLIED THE PROPER SUMMARY JUDGMENT STANDARD, WHERE THE ISSUE PETITIONER SEEKS TO HAVE REVIEWED MERELY REQUIRES A FACTUAL REDETERMINATION BY THIS COURT AND THE OUTCOME IS ONLY OF IMPORTANCE TO THE PARTIES INVOLVED, AND WHERE MICHIGAN LAW MANDATES THE RESULT THE COURT OF APPEALS REACHED?

LIST OF PARTIES

Respondent, Sears, Roebuck and Co., is a corporation organized under the laws of the State of New York and has no parent company. The following is a list of Respondent, Sears, Roebuck and Co.'s significant corporate subsidiaries:

Allstate Insurance Company (Illinois)
Allstate Life Insurance Company (Illinois)
PMI Mortgage Insurance Co. (Arizona)
Homart Holding Company of Delaware, Inc. (Delaware)
Homart Development Co. (Delaware)
Sears Canada, Inc. (Canada)
Sears Acceptance Company, Inc. (Canada)
Sears Roebuck de Mexico, S.A. de C.V. (Mexico)
Sears Overseas Finance N.V. (Netherlands Antilles)
Sears Receivables Financing Group, Inc. (Delaware)
Sears Roebuck Acceptance Corp. (Delaware)
Sears Savings Bank (California)
Western Auto Supply Company (Delaware)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

INDEX OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 6

I. THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY AFFIRMING THE DISTRICT COURT, WHERE THE DISTRICT COURT APPLIED THE SUMMARY JUDGMENT STANDARD ANNUNCIATED AND FOLLOWED BY THIS COURT AND GRANTED SEARS' MOTION FOR SUMMARY JUDGMENT. 7

TABLE OF CONTENTS

Page

II. PETITIONERS' REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED WHERE THE ONLY ISSUE REMAINING IS A FACTUAL DETERMINATION ALREADY DECIDED IN SEARS' FAVOR BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS AND THE OUTCOME IS OF INTEREST ONLY TO THE PARTIES INVOLVED IN THIS PARTICULAR CASE. 11

III. MICHIGAN LAW COMPELLED THE COURT OF APPEALS' DECISION. 13

APPENDIX D - Complaint . . . . . Resp. App. 1

APPENDIX E . . . . . Resp. App. 10
Defendant's Motion for Reconsideration Regarding Defendant's Motion for Summary Judgment

APPENDIX F . . . . . Resp. App. 12
October 13, 1992 Order of the District Court

APPENDIX G . . . . . Resp. App. 15
October 15, 1992 Order of the District Court

TABLE OF CONTENTS

Page

APPENDIX H ..... Resp. App. 17

Garabedian v. William Beaumont Hosp., ___ Mich. App. ___ (released for publication February 6, 1995)

INDEX OF AUTHORITIES

CASES: Page

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 3, 6, 8-11, 14, 15

Bouldis v. United States Suzuki Motor Corp.,
711 F.2d 1319 (6th Cir. 1983) 9

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 3, 6, 8-10, 19

Coffey v. Foamex L.P.,
2 F.3d 157 (6th Cir. 1993) 8

E.E.O.C. v. University of Detroit,
904 F.2d 331 (6th Cir. 1990) 8-10

Garabedian v. William Beaumont Hospital,
___ Mich. App. ___
(released for publication February 6, 1995) ... 7, 20-21

Houston Oil Co. v. Goodrich,
245 U.S. 440, 62 L.Ed. 385, 38 S. Ct. 140 (1918) ... 6, 11

Macene v. MJW, Inc.,
951 F.2d 700 (6th Cir. 1991) 8

INDEX OF AUTHORITIES

CASES: Page

Matsushita Electrical Industrial Co. v.Zenith Radio Corp.,
475 U.S. 574 (1986) 6, 8, 10

Oppenheim v. Pitcairn,
293 Mich. 475, 294 N.W. 374 (1940) 4, 7, 14

Patton v. Beard,
8 F.3d 343 (6th Cir. 1993) 8

Pinney Dock and Transp. Co. v. Penn. Cent. Corp.,
838 F.2d 1445 (6th Cir. 1988) 9

Rudolph v. United States,
370 U.S. 269, 8 L.Ed. 2d 484, 82 S. Ct. 1277 (1962) . 6, 12

Skinner v. Square D Co.,
445 Mich. 153, 516 N.W.2d 475 (1994) . 4, 7, 15-18, 20-21

Southern Power Co. v. North Carolina Public Service Co.,
263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164 (1924) 6, 12

Tacon v. Arizona,
410 U.S. 351, 35 L.Ed. 2d 346, 93 S. Ct. 998 (1973) . 6, 12

INDEX OF AUTHORITIES

Page

Thompson v. County of Medina,
29 F.3d 238 (6th Cir. 1994) 8

COURT RULES:

Fed. R. Civ. P. 56 ..... 6, 14-15

Federal Rule of Civil Procedure 56(c) 9

Federal Rules of Evidence 19

Rule 50 15

Supreme Court Rule 10 ..... 5, 13

OTHER AUTHORITIES:

New York University Supreme Court Project:
A Managerial Theory of the Supreme Court's Responsibilities:
An Empirical Study; 59 N.Y.U. L. Rev. 681 12

No. 94-1413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REBECCA BAKER, A Legally Incapacitated Person,
By WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.

Petitioners,

v.

SEARS, ROEBUCK AND CO.,
A Foreign Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent accepts Petitioners' Statement of Opinions Below.

STATEMENT OF JURISDICTION

Respondent, Sears, Roebuck and Co., accepts and relies upon the jurisdictional statement set forth by Petitioners in their Petition for Writ of Certiorari, located at pages 2-3.

STATEMENT OF THE CASE

Petitioners' request for writ of certiorari arises from a personal injury action brought by Petitioner Rebecca Baker (Plaintiff-Appellant below, and hereafter "Petitioner")[1] against Respondent Sears, Roebuck and Co. (Defendant-Appellee below, and hereafter "Sears"). In her Complaint, Petitioner claimed damages for injuries allegedly sustained in a fall while descending a stairway in Sears' Highland Park, Michigan store. Petitioner alleged claims for (1) negligence due to the presence of water on the stairs; (2) the allegedly defective design of the stairway; and (3) failure to warn of a defective or dangerous condition. (App. D, pp. 4-6).

Sears denied liability and, following the close of discovery, moved for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). On September 18, 1992, the District Court for the Eastern District of

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[1]Other named Petitioners are Ms. Baker's legal guardian, William J. Baker, Jr., and her husband, William J. Baker, Sr. Together, the Bakers are referred to herein as "Petitioners."

Michigan, Southern Division, granted Sears' motion in part (with respect to the negligence claim), and denied it in part (with respect to Petitioners' defective design and failure to warn claims). (App. B-16).

On October 1, 1992, Sears requested that the District Court reconsider that portion of its order pertaining to the defective design claim, arguing that Petitioners were belatedly attempting to alter their version of how Ms. Baker fell and that Petitioners offered no evidence to establish that a design defect, assuming one existed, caused her fall. (App. E). The District Court denied Sears' request for reconsideration on October 13, 1992, on the basis that Sears had not originally moved for summary judgment as to Petitioners' design claims. (App. F).

Nevertheless, on October 15, 1992 the District Court directed the parties to submit supplemental briefs that specifically addressed the issue of whether Sears was entitled to summary judgment as to Petitioners' design defect and failure to warn claims. (App. G). After considering both parties' supplemental briefs and responses thereto, the District Court, on December 17, 1992, issued an Opinion and Order granting summary judgment in favor of Sears and a Judgment dismissing Petitioners' Complaint in its entirety. (App. C). Citing this Court's decisions in ***Celotex v. Catrett***, 477 U.S. 317 (1986); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); and the Michigan Supreme Court's decision in

Oppenheim v. Pitcairn, 293 Mich. 475, 294 N.W. 374 (1940) as being controlling, the Court held that even *assuming* the existence of some design defect, Petitioners failed to establish a genuine issue of material fact on the issue of proximate causation. (App. C-11). (". . . Plaintiff has failed to make a showing sufficient to establish the existence of an element essential to plaintiff's case and on which plaintiff has the burden of proof at trial, and thus summary judgment in favor of defendant is proper.")

Petitioners then appealed the District Court's grant of summary judgment in Sears' favor to the United States Court of Appeals for the Sixth Circuit. First affirming the District Court as to Petitioners' negligence claim, the Court of Appeals again cited ***Oppenheim*** and noted that since the only evidence presented on the issue of notice was presented by Sears, Sears was properly granted judgment as a matter of law by the district court. (App. A-4).

With respect to Petitioners' defective design and related failure to warn claims, the Court, relying on the Michigan Supreme Court's opinion in ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994), held that because Petitioners failed to offer proof beyond mere speculation as to whether or not the alleged defect caused Petitioner's injury, they did not succeed in proving the existence of any general issue of material fact on an essential element of Petitioner's claim -- proximate cause

-- and Sears was entitled to summary judgment as a matter of law. (App A.-6, 7).

Petitioners filed their Petition for Writ of Certiorari to the Sixth Circuit on January 19, 1995, arguing that by affirming the District Court's grant of Sears' motion for summary judgment, the Court of Appeals sanctioned the application of a summary judgment standard that constituted a departure "from the accepted and usual course of judicial proceedings" pursuant to Supreme Court Rule 10, which sets forth the circumstances under which this Court will exercise its extraordinary power of supervision. (Petition, pp. 13-14).

For the reasons stated herein, Respondent, Sears, Roebuck and Co., respectfully requests that the Court deny Petitioners' Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Sixth Circuit Court of Appeals used the proper standard in affirming the granting of Sears' summary judgment motion. In upholding the District Court's decision, which cited this Court's controlling decisions of ***Celotex v. Cattrett***, 477 U.S. 317 (1986); ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); and ***Matsushita Electrical Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986), the Court of Appeals found it clear that since Petitioners' proofs failed to reach beyond the pleadings in this case, there was no genuine issue of material fact pursuant to Fed. R. Civ. P. 56 and Sears was entitled to judgment as a matter of law.

Since the Sixth Circuit applied the proper summary judgment standard, Petitioners' request for writ of certiorari should be denied outright because what Petitioners are really seeking is a mere determination of purely factual issues whose outcome is only significant to the litigants themselves. This Court has held on numerous occasions that it is improvident to grant a petition for writ of certiorari in such situations. ***Houston Oil v. Goodrich***, 245 U.S. 440 (1918); ***Southern Power Co. v. North Carolina Public Service Co.***, 263 U.S. 508 (1924); ***Rudolph v. United States***, 370 U.S. 269 (1962); ***Tacon v. Arizona***, 410 U.S. 351 (1973). Accordingly, Petitioners' request should not be granted simply because they are personally dissatisfied with the result they received below.

Finally, even if the Court were to grant Petitioners' request for certiorari, the Sixth Circuit's decision should be upheld because Petitioners are completely unable to offer any evidence that would create a genuine issue of material fact pursuant to the dispositive Michigan substantive case law governing Petitioners' state law claims. ***See Oppenheim v. Pitcairn***, 293 Mich. 475, 294 N.W. 374 (1940); ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994); ***Garabedian v. William Beaumont Hospital***, ___ Mich. App. ___ (released for publication February 6, 1995) (App. H).

I.

THE COURT OF APPEALS DID NOT SANCTION A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY AFFIRMING THE DISTRICT COURT, WHERE THE DISTRICT COURT APPLIED THE SUMMARY JUDGMENT STANDARD ANNUNCIATED AND FOLLOWED BY THIS COURT AND GRANTED SEARS' MOTION FOR SUMMARY JUDGMENT.

Petitioners claim that by affirming the District Court's grant of summary judgment in Sears' favor, the Sixth Circuit effectively sanctioned the application of

"summary judgment and/or review standards to the parties in this particular case, which standards are not the norm." (Petition, p. 11). Further, Petitioners refer to the standard applied as being a "dangerous" one which "conflicts with respected and logical law and practice." ***Id.***

On the contrary, the summary judgment standard sanctioned by the Court of Appeals *is* the majority view, set forth by this Court in a trilogy of cases decided in 1986, ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242 (1986); ***Celctex Corp. v. Catrett***, 477 U.S. 317 (1986); and ***Matsushita Electrical Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574 (1986) and cited repeatedly since by the Sixth Circuit. ***See., e.g., Patton v. Beard***, 8 F.3d 343 (6th Cir. 1993); ***Macene v. MJW, Inc.***, 951 F.2d 700 (6th Cir. 1991); ***Coffey v. Foamex L.P.***, 2 F.3d 157 (6th Cir. 1993); ***Thompson v. County of Medina***, 29 F.3d 238 (6th Cir. 1994).

Curiously, even Petitioners -- in complete conflict with their own position on this issue -- concede that ***Celotex*** and ***Anderson*** annunciate the proper standard and, along with the Sixth Circuit's decisions in ***E.E.O.C. v. University of Detroit***, 904 F.2d 331 (6th Cir. 1990) and ***Patton v. Beard***, ***supra***, reflect "the majority views of the law." (Petition, p. 14).[2] However, it is notable that

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[2]The Sixth Circuit in ***Patton*** also recognized ***Anderson*** and ***Celotex*** as setting forth the appropriate summary judgment standard.

Petitioners only reference ***Celotex*** and ***Anderson*** by citation and do *not* discuss what the Court *actually held* in those cases regarding the propriety of granting summary judgment. ***Id.*** Instead, they purport to "quote" ***E.E.O.C., supra*** by stating that with respect to the Sixth Circuit's approach to deciding a motion for summary judgment, "the substantive law of the situs mandates 'that all facts must be viewed and inferences drawn in favor of the plaintiffs' for purposes of summary disposition." (Petition, p. 13)

The passage Petitioners purport to cite is not located *anywhere* in the ***E.E.O.C.*** opinion. What Petitioners are actually quoting is Judge Damon Keith's lone dissenting opinion in the Court of Appeals' decision (App. A-8), *not* the Sixth Circuit's majority opinion in ***E.E.O.C.***, as they represent. What the ***E.E.O.C.*** decision *actually* states as being the correct standard under Rule 56(c) is as follows:

> This court, therefore, must now apply a *de novo* standard of review, making all **reasonable** inferences in favor of the non-moving party to determine if a genuine issue of material fact indeed exists.

Id. at 333 (***citing Pinney Dock and Transp. Co. v. Penn. Cent. Corp.,*** 838 F.2d 1445 (6th Cir. 1988); ***Bouldis v. United States Suzuki Motor Corp.***, 711 F.2d 1319 (6th Cir. 1983)) (emphasis added).

The aforementioned passage from ***E.E.O.C.*** is clearly consistent with this Court's opinions in ***Anderson***, ***Celotex***, and ***Matsushita***. In ***Anderson***, this Court addressed the propriety of grafting a "reasonableness requirement" onto the summary judgment standard, stating that:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may **reasonably** be resolved in favor of either party . . . [F]ormerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more **reasonable** rule, . . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251.

Moreover, the Sixth Circuit's holding with respect to the defective design/failure to warn claims -- that Petitioners' claim failed below due to their inability to

point to any evidence that facilitated "**reasonable** inferences of causation, not mere speculation" -- is proof itself that the proper summary judgment standard was applied. ***Anderson, supra***. (App. A-6). This, coupled with Petitioners' own concession that the Court of Appeals in fact used the proper standard, renders Petitioners' argument in this regard a virtual non-issue.

II.

PETITIONERS' REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED WHERE THE ONLY ISSUE REMAINING IS A FACTUAL DETERMINATION ALREADY DECIDED IN SEARS' FAVOR BY BOTH THE DISTRICT COURT AND THE COURT OF APPEALS AND THE OUTCOME IS OF INTEREST ONLY TO THE PARTIES INVOLVED IN THIS PARTICULAR CASE.

This Court has repeatedly held that a writ of certiorari, once bestowed by the Court, must be dismissed as improvidently granted where the issues to be decided merely require a redetermination by the Court of purely factual issues whose outcome is of importance only to the particular litigants involved. ***Houston Oil Co. v. Goodrich,*** 245 U.S. 440, 62 L.Ed. 385, 38 S. Ct. 140 (1918) (certiorari dismissed as improvident where petitioner claimed that the Court of Appeals

incorrectly affirmed the District Court on an issue that would depend on the Court's reevaluation and appreciation of the evidence); ***Southern Power Co. v. North Carolina Public Service Co.***, 263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164 (1924); ***Rudolph v. United States***, 370 U.S. 269, 8 L.Ed. 2d 484, 82 S. Ct. 1277 (1962) (tax issue which depended on a redetermination of factual questions by the Court and was of importance only to the parties to the case inappropriate for review by writ of certiorari); ***Tacon v. Arizona***, 410 U.S. 351, 35 L.Ed. 2d 346, 93 S. Ct. 998 (1973) (certiorari improperly granted where only issue raised below was factual issue of whether party's conduct constituted a waiver of right to be present at trial).[3]

In this case, since it is clear that the summary judgment standard applied by the District Court and sanctioned by the Court of Appeals did *not* constitute a departure "from the accepted and usual course of judicial proceedings," entitling Petitioners to have their case reviewed by this Court, what Petitioners are actually

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[3]Similarly, one commentator has noted:

> The Court should not grant cases solely to correct error as it affects the individual litigants. As manager, it should intervene strategically, to maximize the impact of **occasional** review of **egregious** error in order to ensure responsible actions by lower courts. We would **not** expect many cases to fall in this category.

New York University Supreme Court Project: A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study; 59 N.Y.U. L. Rev. 681.

asking this Court to do is to make a *redetermination* of the facts of this case because those facts were not evaluated to their satisfaction by the lower courts. Petitioners' personal displeasure with the District Court and Court of Appeals' alleged fact-finding does not constitute grounds for granting certiorari under Supreme Court Rule 10. As already stated, it does not require an exercise of the Court's "power of supervision." Nor does it call into question conflicting decisions among the circuit courts of appeals, conflicting decisions of the Court of Appeals with the state court of last resort with respect to a federal question, or an important question of federal law. (*Id.*, Sections (1)(a)-(c)). As such, there are no grounds present in this case for granting Petitioners' request for certiorari, and their Petition should be dismissed outright on this basis alone.

III.
MICHIGAN LAW COMPELLED THE COURT OF APPEALS' DECISION.

Even assuming, ***arguendo***, this Court were to grant Petitioners' request for writ of certiorari, it should uphold the Court of Appeals' decision, which applied Michigan case law that is factually on point with this case to determine that no genuine issue of material fact exists as to Petitioners' substantive claims and affirmed the District Court's grant of Sears' summary judgment motion. This consideration of substantive state law in

the context of a Rule 56 motion was explained and approved of by this Court in ***Anderson, supra***:

> [T]hus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. **The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of the evidence required by the governing law or that he did not.**

Id. (emphasis added).

First, with respect to Petitioner's negligence and failure to warn claims, both the District Court and Sixth Circuit applied the Michigan Supreme Court's controlling decision in ***Oppenheim v. Pitcairn***, 293 Mich. 475, 294 N.W. 374 (1940). In ***Oppenheim***, the plaintiff claimed that the defendant train station was negligent when she was injured after slipping on water on the defendant's floor.

Nevertheless, the plaintiff in ***Oppenheim*** was unable to offer any proof as to whether or not the allegedly unsafe condition was known to the defendant, or whether the defendant should reasonably have had

such knowledge. Finding that one of the essential elements of the plaintiff's ***prima facie*** case of negligence had not been proven, the trial court directed a verdict for the plaintiff.[4] Similarly, in this case, the Court of Appeals found that since Petitioners offered absolutely *no* evidence on the issue of whether or not Sears had notice of the allegedly dangerous or defective condition, Petitioners did not meet their burden of proof and affirmed the grant of Sears' summary judgment motion.

Furthermore, with respect to Petitioners' defective design and failure to warn claims, the Sixth Circuit applied the dispositive Michigan Supreme Court case, ***Skinner v. Square D Co.***, 445 Mich. 153, 516 N.W.2d 475 (1994), which was decided *after* the District Court rendered its opinion in favor of Sears. In ***Skinner***, the plaintiff's decedent sued the defendant manufacturer, claiming that the decedent's electrocution was caused by a defective switch manufactured by the defendant.

There were no witnesses to the accident in ***Skinner***, and the plaintiff was forced to rely on circumstantial evidence to prove causation. The plaintiff

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[4]With respect to the relationship between a motion for summary judgment pursuant to Rule 56 and a motion for directed verdict under Rule 50, this Court has acknowledged that "the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 251.

offered a variety of causation theories, each of which called for speculation as to what could have caused the accident. Upholding the Michigan Court of Appeals' decision granting summary judgment to the defendant manufacturer, the Michigan Supreme Court held that **"the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation . . . [T]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation . . ."** *Id.* at 163-165 (emphasis added) (citations omitted).

As was found by both the District Court and the Court of Appeals, the facts in this case are undisputed and very similar to those in ***Skinner***. Ms. Baker does not remember falling on the stairs at Sears or anything else about the circumstances of her mishap. (App., A-5; B-3). Nancy Craig, the woman who was accompanying her and the only person present at the time of the accident, never actually saw her fall and does not know what caused her to fall. (App. A-3, 5). Petitioner's so-called "expert," Walter Cygan, testified as to hypothetical situations wherein the design of Sears' staircase might be considered defective if an individual were to step on it, but could not add any independent information regarding the particular circumstances of her fall. (App. A-5, 6). Finally, perhaps the most telling fact of all in this case is the fact that even *Petitioners' counsel* concedes that

"there is no way to verify what Petitioner saw or actually slipped on." (App. A-5).

Faced with these facts, the Sixth Circuit, citing ***Skinner***, stated as follows:

> . . . while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof 'must facilitate reasonable inferences of causation, not mere speculation.' ***Id.*** at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. ***Id.***[5]

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[5]This is the very same passage that Petitioner cites verbatim in her Petition -- without (conveniently) even mentioning the ***Skinner*** case -- and claims that it was a "subjectively stated" finding of the Court of Appeals. On the contrary, since the references to ***Skinner*** are conspicuously noted in the passage, it is obvious that Petitioner's mischaracterization of the Sixth Circuit's holding on this issue as being "subjective" is false. Indeed, perhaps there is nothing *less* "subjective" than what the Court of Appeals did in this

Because the only "evidence" Petitioners presented -- inadmissible hearsay statements and expert testimony with no underlying evidentiary basis in the record -- was insufficient as a matter of law to create a genuine factual issue, the Court of Appeals affirmed the District Court and held that summary judgment was properly granted in favor of Sears.[6]

Petitioners argue that in so holding, the Court of Appeals improperly "weighed the evidence," "made credibility determinations," and "did not view all facts nor draw all inferences in favor of Petitioners." (Petition, p. 12). This assertion is categorically false. On the contrary, Petitioners did not even *offer* any facts to counter Sears' motion with respect to their negligent

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case--follow Michigan substantive law that is directly on point and completely dispositive of Petitioners' design defect and failure to warn claims.

[6]With respect to Petitioners' expert, the Court of Appeals relied on ***Skinner*** for the proposition that "there must be facts in evidence to support the opinion testimony of an expert." (App. A-6). There being no facts and no testimony offered by Petitioners upon which an expert could form an opinion as to the cause of her fall, there was no support for the expert's hypothetical testimony and this evidence was properly ignored. Furthermore, with respect to Petitioners' attempt to use the testimony of Petitioner's sister, who was supposedly prepared to testify that Petitioner had told her after the fall that she had slipped on a dry area of the stairs, the District Court properly found that such testimony "failed to go beyond the pleadings," was hearsay, and was thus inadmissible as a matter of law. (App. C-7, 8).

maintenance claim in the first instance. (App. A-4). Thus, there was no evidence to "weigh." Moreover, Petitioners fail to point out where in the Court of Appeals' opinion any "credibility determination" as to Plaintiff's expert was made. The Court merely determined that, even assuming the truth of the expert's testimony, it would not, without factual support in the record, be sufficient to singularly overcome a motion for summary judgment. (App. A-5, 6).

Furthermore, every possible inference *was* drawn in favor of Petitioners by both the District Court and the Court of Appeals. For the purposes of Sears' motion, it was *assumed* that Petitioners' expert would qualify as an expert under the Federal Rules of Evidence, *and* that Petitioners could prove the elements of duty, breach and damages with respect to their design defect claim. The only inference *not* drawn by the courts below was that essential element of their defective design/failure to warn claim on which the Petitioners could not offer any shred of evidence to create a factual issue--the element of causation. Indeed, ***Celotex, supra***, does not allow such an inference:

> . . . a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. **The moving party is "entitled to judgment as a matter of law "because the non-moving party**

> **has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.**

Id., 106 S.Ct. at 2252 (emphasis added).

Furthermore, the Michigan Court of Appeals has, very recently, decided a case with facts analogous to this case. In ***Garabedian v. William Beaumont Hospital***, ____ Mich. App. ____ (released for publication February 6, 1995) (App. H), the plaintiff sued the defendant hospital in negligence (malpractice) because she fell out of her bed and broke her hip. She was asleep at the time of the incident. As in this case, no one witnessed her fall. The only attempt at proving causation made by the plaintiff was her expert's supposition that "an evaluation of plaintiff's mental condition [to determine if she needed restraining] may have indicated a need for some type of intervention. ***Id.*** at 1. Citing ***Skinner*** as controlling, the court in ***Garabedian*** held that the "mere possibility of . . . causation is not enough; and when the matter remains of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ***Id.*** at 163.

Although the Michigan Supreme Court's decision in ***Skinner*** is dispositive, the ***Garabedian*** decision lends even more support for the proposition that Petitioners

here were required to come forth with more than mere conjecture as to what "might" have caused Ms. Baker's fall. Petitioners argue that "strong public policy" -- that of considering public safety "as a condition precedent to opening a store in a community" -- compels the Court to grant their Petition. On the contrary, it is the policy underlying ***Skinner*** and ***Garabedian, supra*** -- that of disallowing the victims of unwitnessed, yet unfortunate accidents to recover from parties whom they cannot prove were responsible for their injuries -- that prompted the Court of Appeals to affirm the well-reasoned decision of the District Court in this case.

Finally, Petitioners -- once again ignoring the fact that they cannot prove that Sears caused Ms. Baker's injuries -- revealingly state that the Court should feel free to grant their Petition in this case because "Sears has been and will do well regardless of the outcome." (Petition, p. 15). Such a ridiculous assertion is completely antithetical to the requirement of proving fault that is intrinsic to negligence law and is not a principle that should be espoused by any court.

Respondent Sears, Roebuck and Co. respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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March 22, 1995

No. 94-1413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

REBECCA BAKER, A Legally Incapacitated Person,
By WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.

Petitioners,

v.

SEARS, ROEBUCK AND CO.,
A Foreign Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S APPENDIX

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

REBECCA BAKER, a Legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs.

SEARS, ROEBUCK AND COMPANY, INC, a foreign corporation,

Defendant.
_____/

ROTH AND DEAN, P.C.
SANFORD ROTH (P19693)
Attorney for Plaintiffs
3000 Town Center, Suite 450
Southfield, Michigan 48075
(313) 358-0100
_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

COUNT I

GENERAL ALLEGATIONS

APPENDIX D

NOW COME the Plaintiffs, REBECCA BAKER, a legally Incapacitated Person, by her Guardian, WILLIAM J. BAKER, JR., and WILLIAM J. BAKER, SR., by and through their attorneys, ROTH AND DEAN, P.C. , and for her Complaint against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., states as follows:

1. Plaintiff is a resident of the City of Oak Park, County of Oakland, State of Michigan, and William J. Baker, Jr. has been appointed Guardian of Rebecca Baker, a legally incapacitated person, on March 8, 1991, by the Honorable Eugene Arthur Moore, Oakland County Probate Judge.

2. Defendant, Sears, Roebuck and Company, Inc. (hereinafter referred to as defendant "Sears"), is a foreign corporation qualified to do business in the County of Wayne, and the State of Michigan.

3. The amount in controversy exceeds the sum of Ten Thousand dollars ($10,000) and is otherwise within the jurisdiction of this Honorable Court.

4. On January 5, 1991, at approximately 11:00 a.m., plaintiff was on the premises of defendant's store in Highland Park, Michigan.

5. Plaintiff was lawfully upon said premises and had gone there for the purposes of shopping and purchasing consumer goods; plaintiff had reason to be on the second floor of the defendant's premises.

6. Plaintiff was a business invitee of the defendant on the aforementioned date.

APPENDIX D

7. Upon alighting from the second floor of defendant's premises to exit the building, the plaintiff began traveling down a staircase open to the general public.

8. As plaintiff descended down the aforementioned staircase she was caused to suddenly and without warning fall heavily in the stairwell due to the defective condition of the aforementioned staircase.

9. Plaintiff fell heavily in the stairwell, striking her head, back, knees and ankles onto the staircase.

10. The plaintiff was sent to Detroit Osteopathic Hospital wherein she was examined and treated by the emergency room physicians.

11. Plaintiff continues to suffer severs and permanent injuries in addition to medial expenses as a result of the injury which occurred on January 5, 1991.

12. That as a result of the aforementioned severe, progressive and permanent injuries sustained, your plaintiff, REBECCA BAKER, has suffered severe and excruciating pain, both mental and physical, and because of the nature and permanency of the injuries sustained, plaintiff will continue to suffer great pain in the future.

13. That prior to the injuries sustained, your plaintiff, REBECCA BAKER, was an able-bodied female capable of earning good sums of money in her employment and because of the nature and permanency

of the injuries sustained, plaintiff was unable to continue her employment over a long period of time and your plaintiff's earning capacity has been greatly diminished, if not permanently curtailed.

14. That prior to the injuries sustained, your plaintiff, REBECCA BAKER, was an able-bodied female, capable of performing her household duties, her hobbies and entertainment and because of the nature and permanency of the injuries sustained, she was unable to continue such activities over a long period of time.

WHEREFORE, Plaintiffs, REBECCA BAKER, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

COUNT II

NEGLIGENCE

15. Plaintiff hereby incorporates by reference hereto, each and every allegations set forth in plaintiff's Complaint herein in Count I as if same were set forth herein paragraph by paragraph and work for work.

16. Defendant Sears owed a duty to business invitees to keep its premises free from dangerous defects and conditions and to reasonable inspect and discover said defects.

APPENDIX D

17. Defendant allowed the above mentioned staircase to exist in a dangerous condition while being used by said business invitees.

18. That at all times relevant herein, plaintiff exercised reasonable care and is entirely free from any negligence contributing thereto.

19. Defendant breached the aforementioned duty by allowing the above mentioned staircase to be used by business invitees while ion a defective condition.

20. Defendant neglected and failed to carry out the duties as described hereinabove and breached the same in the following ways, among others:

a. Failed to properly maintain its premises in that it allowed a dangerous condition to exist in the form of a defective staircase upon which business invitees were required to walk;

b. Carelessly and negligently permitting said staircase to remain in a slippery, dangerous and defective condition and not exercising reasonable care to correct said condition;

c. Failure to take reasonable precautions to remove the slippery substance from said staircase so as

to make the stair case suitable for walking thereon;

d. Failed to take reasonable precautions to make the above mentioned staircase safe and suitable for walking thereon;

e. Knew or should have know that the above mentioned staircase was in the defective and unsafe condition;

f. That if defendant made any attempt to maintain the above mentioned staircase, defendants actions were performed in such a manner so as to increase the hazard to the plaintiff herein;

g. Failed to warn the plaintiff of a defective and hazardous condition of the above mentioned staircase which the defendant knew or should have known existed at the aforementioned time;

h. Failure to place a covering/runner on the individual stairs in the above mentioned staircase.

APPENDIX D

21. Defendant's negligence was a direct and proximate cause of the injuries and damages sustained by the plaintiff herein.

22. As a proximate cause of the negligence of the defendant, while plaintiff was walking upon the aforementioned staircase owned and operated by the defendant and while in the exercise of due care and caution, slipped on the aforementioned defective staircase, which had been negligently allowed to remain in a defective state, causing the plaintiff to fall and suffer severe and permanent injuries.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR., and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

COUNT III

LOSS OF CONSORTIUM

23. Plaintiff hereby incorporates by reference hereto, each and every allegation set forth in plaintiff's Complaint herein in count I and count II as if same were set forth herein paragraph by paragraph and word by word.

APPENDIX D

24. At all times relevant hereto, the plaintiff, Rebecca Baker, was and is the legally weed wife of the plaintiff, William J. Baker, Sr.

25. As a direct and proximate result of the conduct of the defendants hereinabove alleged, plaintiff, William J. Baker, Sr., suffered and is continuing to suffer the loss of his wife's service, society, companionship and consortium.

26. As a further direct and proximate result of the conduct of the defendant hereinabove alleged, the plaintiff, William J. Baker, Sr., did pay and incur, and will be compelled for a long period of time to pay and incur, large sums for the care and treatment of the plaintiff, Rebecca Baker, for the above mentioned pain and suffering.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC. in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

APPENDIX D
COUNT IV

DAMAGES

27. Plaintiff hereby incorporates by reference hereto, each and every allegation set forth in plaintiff's Complaint herein in Count I and Count II as if same were set forth herein paragraph by paragraph and work for work.

28. As a direct and proximate result of the negligence of the defendant. plaintiff, Rebecca Baker, suffered physical and mental pain and suffering, as well as physical injury, including but not limited to:

a. Injuries to the head;
b. Injuries to the right ankle;
c. Injuries to the left ankle;
d. Injuries to the knees;
e. Contusions and bruising.

29. As a further and proximate result of the aforementioned negligence of the defendant, plaintiff was caused the following additional damages:

a. Hospital, medical and pharmaceutical expenses, past, present and future;
b. Loss of earnings and earning capacity, past, present and future;
c. Severe pain and suffering, emotional and physical, past, present and future;

APPENDIX D

d. Severe disfigurement, embarrassment, mortification and humiliation which will continue for her natural life;

e. Loss of the ability to enjoy life.

30. The above mentioned conditions are permanent in nature and duration and plaintiff is expected to suffer the same for the remainder of her natural life.

31. In the event that it is determined that the plaintiff was suffering from any pre-existing condition on or about the date set forth in this Complaint, then it is averred and alleged that the negligence of the defendant proximately resulted in the aggravation, precipitation and/or exacerbation of said pre-existing condition.

WHEREFORE, Plaintiffs, REBECCA BAKER, a legally incapacitated person, by her Guardian, WILLIAM J. BAKER, JR. and WILLIAM J. BAKER, SR., pray for judgment against the Defendant, SEARS, ROEBUCK AND COMPANY, INC., in an amount in excess of Ten Thousand Dollars ($10,000), and in an amount which is deemed fair and just and consistent with laws and evidence, together with costs, interest and attorney's fees.

ROTH AND DEAN, P.C.

BY: _____

SANFORD ROTH (P19693)
Attorney for Plaintiffs
3000 Town Center, Suite 450

Respondent's 11

APPENDIX D

Southfield, Michigan 48075
(313) 358-0100

Dated: September 24, 1991

Respondent's 12

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, a Legally
Incapacitated Person, by
WILLIAM J. BAKER, JR., Guardian,
and WILLIAM J. BAKER, SR.,

Plaintiffs,

Case No. 91 CV 75687 DT

v. Hon. Lawrence P. Zatkoff

SEARS, ROEBUCK AND CO., a
Foreign Corporation,

Defendant.

_____/

Sanford Roth (P19693)
Leslie Kohn (P34889)
Attorney for Plaintiffs
3000 Town Center, Suite 450
Southfield, MI 48075

(313) 358-0100

Charles C. DeWitt, Jr. (P26636)
Michael P. Cooney (P39405)
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400 Renaissance Center
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(313) 568-6953

_____/

MOTION FOR RECONSIDERATION REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Sears, Roebuck and Co., by its attorneys, Dykema Gossett, moves this Court pursuant to Fed. R. Civ. P. 56(c) and Local Rule 7.1 (h) for reconsideration of defendant's July 17, 1992 Motion for Summary Judgment and that part of the Court's August 18, 1992 Memorandum Opinion and Order denying in part defendant's motion. Defendant moves for reconsideration on the basis that plaintiff failed in its response to defendant's motion to offer admissible evidence establishing that the alleged design defects caused plaintiff's injuries and the Court in its Opinion and Order did not address plaintiff's inability to establish this element of their prima facie negligence claim against defendant.

WHEREFORE, defendant Sears, Roebuck and Co. respectfully requests that this Court reconsider its

Respondent's 14

APPENDIX E

August 18, 1992 Memorandum Opinion and Order denying in part defendant's Motion for Summary Judgment as to plaintiff's negligent design claim and grant defendant's motion for summary judgment in its entirety.

Respectfully Submitted,

DYKEMA GOSSETT

By: _____

Charles C. DeWitt, Jr. (P26636)
Michael P. Cooney (P39405)
Attorneys for Defendant
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6953 or 568-6955

Dated: October 1, 1992

Respondent's 15

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally
Incapacitated Person, by
WILLIAM J. BAKER, JR.,
Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs. CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.

_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of

Michigan, on the 13th day of October 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendant Sears, Roebuck and Company's ("Sears") motion for reconsideration of a Memorandum Opinion and Order granting in part and denying in part Sears' motion for summary judgment. Sears, in its brief in support of summary judgment, stated that:

> The undisputed facts in this case demonstrate that the defendant is entitled to summary judgment on two separate and independent grounds: (1) Because Plaintiff knew of the allegedly hazardous condition before her fall, Defendant has no duty to warn of the open and obvious danger [water]; and (2) Plaintiff cannot establish that the allegedly hazardous condition was present for any length of time such that Defendant had or should have had notice of the condition.

Sears' entire theory upon which it brought the motion for summary judgment was centered around the presence of water of the stairs. Plaintiff, in her response brief and in accordance with the complaint in this case,

stated that defendant's liability rested not only on the existence of water on the stairs, but also on the theory of negligent design. Sears, in its reply, argued that plaintiff's expert was not qualified and plaintiff still knew that the steps were slippery because of the water on the steps.

Sears, in its motion for reconsideration, for the first time, raises the issue that plaintiff, as a matter of law, cannot establish that the alleged defective design of the staircase was the proximate cause of plaintiff's injuries. Sears did not move for summary judgment on the theory that plaintiff could not prove the necessary elements to establish a cause of action under plaintiff's defective design claim. Sears' motion for summary judgment was limited to the issue of water on the stairs. This Court, in its Memorandum Opinion and Order, addressed the issue of negligent design solely for the purpose of clarifying the exact issues that were left for trial.

Since defendant did not move for summary judgment on plaintiff's claim that the stairs were defectively designed, it is entirely inappropriate to raise this issue on a motion for reconsideration. One cannot accomplish in a motion for reconsideration what one did not seek in its motion for summary judgment.

Accordingly, defendant's motion for reconsideration is **DENIED.**

IT IS SO ORDERED.

Respondent's 18

APPENDIX F

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs.

vs.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.

_____/

ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 15th day of October 1992.

APPENDIX G

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This Court ORDERS that plaintiff and defendant submit supplemental briefs addressing plaintiff's claim that the staircase was defectively designed and whether defendant is entitled to summary judgment on this issue. This Court did not address this issue in its Memorandum Opinion and Order dated September 18, 1992, because defendant did not move for summary judgment on this issue. This fact that the issue was raised in plaintiff's response and in defendant's reply did not give this Court power to grant summary judgment on this issue. The parties shall have seven (7) days from the date of this Order to file their supplemental briefs.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT COURT

Appendix H

STATE OF MICHIGAN
COURT OF APPEALS

SARAH GARABEDIAN,

Plaintiff-Appellant/
Cross-Appellee,

v

William Beaumont Hospital,

Defendant-Appellee/
Cross-Appellant.

For Publication
February 6, 1995
9:00 a.m.

No. 159869

L.C. No. 91-405887-NH

Before: Taylor, P.J., and Holbrook and M.E. Dodge. [*]JJ.

Taylor, P.J.

Plaintiff appeals as of right from the circuit court's order granting a directed verdict in favor of defendant. The principal issue on appeal is whether plaintiff presented sufficient evidence of causation to allow the matter to go to the jury. We affirm.

Plaintiff, an 87-year-old woman, had been taken by her daughter, Agnes Nassar, to the William

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[1]Circuit Judge, sitting on the Court of Appeals by assignment.

Appendix H

Beaumont Hospital Emergency Room with a terrible headache and sudden blindness. Ms. Nassar was only allowed to visit plaintiff for 5 minutes each hour. Ms. Nassar testified that plaintiff's mental condition deteriorated after she received medication and described her condition as "out of it." Concerned that the siderails on plaintiff's bed were not up, Ms. Nassar told the nurses she felt plaintiff was going to fall off the bed. The nurses said they were watching her. However, plaintiff did fall off the bed and an x-ray showed she broke her hip.

Registered Nurse Sharon LaMarre testified that to comply with the standard of care, a registered nurse is required to conduct a nurse's assessment including an ongoing assessment of plaintiff's mental condition. Her review of plaintiff's medical record indicate that such an assessment was not made in this case. LaMarre further opined that an evaluation of plaintiff's mental condition may have indicated a need for some type of intervention. For example, having a family member or a nurse stay with the patient. LaMarre concluded that, had such intervention occurred in this case, the accident might have been prevented.

In granting the motion for directed verdict, the trial court reasoned that the case was virtually devoid of any showing of breach of duty and proximate cause. Initially, we note that the court's statement regarding there being no evidence of a breach of duty was

erroneous because it was not argued by defendant in seeking a directed verdict. Pursuant to MCR 2.515, a party must state specific grounds in support of a motion for directed verdict. On appeal, we will not review grounds for sustaining a directed verdict which were not articulated to the trial court. McClain v Alger, 150 Mich App 306 312-313; 388 NW2d 349 (1986). Accordingly, the only issue we must determine is whether plaintiff presented sufficient evidence regarding causation.

In reviewing a ruling on a motion for directed verdict, the court is to examine the evidence presented in a light most favorable to plaintiff. Locke v Pachtman, 446 Mich 216, 223; 521 NW2d 786 (1994); Morrow v Boldt, 203 Mich App 324, 327; 512 NW2d 83 (1994). Granting plaintiff every reasonable inference and resolving any conflict in the evidence in plaintiff's favor, Goldman v Phantom Freight, 162 Mich App 472, 477; 413 NW2d 433 (1987), we agree with the trial court's conclusion that reasonable minds could not differ on the question of causation.

Because plaintiff does not recall how she fell from the bed, and because there were no witnesses to the fall, plaintiff must rely on circumstantial evidence to establish the casual link between defendant's alleged negligence and the harm suffered. Skinner v Square D Co. 445 Mich 153, 163: 516 NW2d 475 (1994). "To the adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere

speculation." Id. at 164. According to LaMarre's testimony, if plaintiff had been adequately evaluated, the evaluation might have revealed a need for intervention, and that intervention might have prevented plaintiff's injury. Plaintiff's attenuated theory of causation does not establish a reasonable basis for concluding that it is more likely than not that defendant's conduct was the cause of plaintiff's injury. Id. at 165. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." Id. We cannot conclude that plaintiff's injury is attributable to defendant's alleged failure to evaluate and chart plaintiff's condition. Boyd v Wyandotte, 402 Mich 98, 105; 260 NW2d 439 (1977).

Given our resolution of this issue, we find it unnecessary to address the issue advance in defendant's cross-appeal.

Affirmed.

/s/ Clifford W. Taylor
/s/ Michael E. Dodge

Appendix H
STATE OF MICHIGAN
COURT OF APPEALS

SARAH GARABEDIAN,

Plaintiff-Appellant/
Cross-Appellee,

v

William Beaumont Hospital,

Defendant-Appellee/
Cross-Appellant.

For Publication
February 6, 1995
9:00 a.m.

No. 159869

L.C. No. 91-405887-NH

Before: Taylor, P.J., and Holbrook, Jr., and M.E. Dodge., **JJ.

HOLBROOK, Jr., J. (dissenting).

Viewing the evidence in a light most favorable to plaintiff, and permitting every reasonable inference in her favor, I would find that plaintiff presented sufficient evidence of causation to withstand a motion for directed verdict.

According to plaintiff's proofs, before falling off the stretcher, plaintiff experienced a severe headache, loss of sight to her right eye, placement in a dark room to reduce eye strain, an x-ray, a CT scan, a lumbar

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[2]Circuit Judge, sitting on the Court of Appeals by assignment.

puncture, insertion of an IV needle, and administration of a sedative and two diuretics. In addition, plaintiff's daughter, Agnes Nassar, was permitted to sit with plaintiff for only five minutes each hour, notwithstanding that Nassar had expressed concern to the nurses that plaintiff might fall from bed because plaintiff was "out of it," her bed side rails were not raised, and plaintiff was not otherwise restrained. In light of these facts, coupled with plaintiff's advanced age and disoriented condition, it was beyond mere speculation that she might attempt to get up and go to the bathroom without asking for assistance. Thus, plaintiff's proofs were sufficient to establish a prima facie case that the nursing staff was negligent in failing to appropriately assess and monitor plaintiff's condition, and that had they done so plaintiff's injuries more than likely would have been prevented.

The majority's reliance on Boyd v City of Wyandotte, 402 Mich 98; 260 NW2d 439 (1977), is mistaken. The Boyd Court held that, under the circumstances of that case, a physician's failure to maintain adequate records of a patient's treatment was not a proper theory of recovery under negligence principles. Id. at 104-105. Here, plaintiff's theory is that defendant's employees were negligent in failing to assess and monitor her condition consistent with the appropriate standard of care, and that had they done so it was more than likely that her injury would not have occurred. The majority is therefore mistaken when it

Appendix H

relies on Boyd as support for the proposition that plaintiff's injury in this case was not "attributable to defendant's alleged failure to evaluate and chart plaintiff's condition."

Plaintiff's circumstantial proofs were sufficient to permit a reasonable jury to infer a logical and substantial nexus between defendant's alleged negligence and plaintiff's injuries. See., e.g. Washington Hospital Center v Martin, 454 A2d 306 (DC App, 1982) Osborn v Public Hospital Dist 1, 80 Wash 2d 201; 492 P2d 1025 (1972); Norris v Rowan Memorial Hospital, Inc. 21 NC App 623; 205 SE2d 345 (1974).

Accordingly, I dissent.

/s/ Donald E. Holbrook, Jr.